Fauziah Khanom bt Irshad Ali Khan v Pegawai Pejabat Pelajaran Daerah Johor Bahru & Ors

HIGH COURT (JOHOR BAHRU) — NO 21NCVC-21 OF 2011
VERNON ONG J
18 OCTOBER 2012

Administrative Law — Civil Servant — Absent without leave — Salary deductions — Authority of the headmaster to deduct wages of employee for periods of absence from work without good reason — Whether administrative or disciplinary power — Whether notice to be given as prerequisite for exercise of this power — General Orders Chapter C 1974 reg 14A

Administrative Law — Rights and liabilities of public servants — Declaration — Transfer order — Mental distress and nervous shock — Whether due to transfer order — Salary deductions — Period during which plaintiff was absent — Whether salary deductions founded on valid grounds — Whether deduction made in line with General Orders Chapter C 1974

Constitutional Law — Public servant — Transfer — Cause of action — Transfer prompted by improper motive or bad faith — Whether plaintiff's perception of punishment via transfer established — Whether plaintiff entitled to right to be heard — Prerogative right of government to transfer — Federal Constitution art 135(2)

Evidence — Burden of proof — Standard of proof — Transfer order — Whether of mala fide — Whether evidential burden of proof satisfied — Evidence Act 1950 ss 101 & 102

Labour Law — Employment — Renumeration — Special allowance for teaching English subject — Allowance discontinued as plaintiff failed to report for work — Whether plaintiff wrongly denied allowances for teaching English — Whether prerogative of defendants to decide whether to require plaintiff to continue to teach English — Federal Constitution art 132

The plaintiff, a senior administrative teacher at Sekolah Kebangsaan Taman Skudai Baru 2 ('SKTSB2'), was transferred to Sekolah Kebangsaan Taman Tampoi Utama ('SKTTU') with effect from 1 June 2008. She contended that

the transfer order was mala fide. The transfer came about because of some complaints the defendants received against the plaintiff as regards to her work as a teacher in SKTSB2. The plaintiff did not receive any such complaints and was not given the opportunity to explain and challenge the complaints. Instead, she was transferred out from SKTSB2 without any proper investigation being conducted in relation to the complaints. Further, the plaintiff's civil suit against a particular PIBG member in SKTSB2 had perturbed the defendants' officers who sought to punish the plaintiff for her insolence by transferring her to SKTTU. Apart from the above, her salary deduction and set off against her salary was not done in accordance with the rules. The salary was deducted by the defendants in 2004–2011 without any proper reasons and she was not given any notice before the deductions were made. She was not allowed to teach the English subject effecting from January 2011 although she had been teaching the subject since 1989 until June 2008; and she was not paid the special allowance for teaching the English subject from March 2011. She suffered nervous breakdown as early as August 2008 and continued to receive medical help after the transfer order was issued. Hence, the plaintiff claimed against the defendants a declaration that the transfer from SKTSB2 to SKTTU was irregular and in breach of the rules of natural justice. The plaintiff also claimed, inter alia, damages for loss of salary that was deducted by the defendants, loss of allowance as an English subject teacher and damages for mental distress and nervous shock. The principal issues of this case were as follows: (i) whether the transfer order was irregular for being made mala fide. If the answer is in the affirmative, whether the plaintiff's mental distress and nervous shock was due to the transfer order; (ii) whether the salary deductions and set off were proper and regular; and (iii) whether the plaintiff was entitled to the allowance as an English subject teacher.

Held, dismissing the plaintiff's claim with costs:

(1) At any rate, there was no evidence to justify a finding of mala fide or lack of good faith on the part of the defendants in making the transfer order. Mere suspicion on the part of the plaintiff that there was mala fide is not enough. Even if the plaintiff's perception of punishment via transfer was true, there was nothing in the Federal Constitution that entitled the plaintiff to bring her grievances before a court of law unless the punishment amounted to a dismissal or reduction in rank; which was not the case here. The plaintiff's transfer is a prerogative right of the government and not a disciplinary proceeding subject to art 135(2) of the Federal Constitution. On the facts of this case, there were no charges preferred against the plaintiff prior to the transfer order; therefore, there was no requirement of an opportunity to be heard in answer to the charges (see para 30).

(2) The salary deductions and set off were made pursuant to reg 14A of the General Orders Chapter C 1974. Regulation 14A provides for salary to

be deducted where a government employee is absent without leave. Clearly, this provision empowered the headmaster qua head of department with the authority to deduct wages of the employee for periods of absence from work without good reason. There was no requirement for any notice to be given as a prerequisite for the exercise of this power (see para 40).

(3) The plaintiff's argument that she was absent from work due to her medical condition and that she had the medical reports to support her claim is misconceived. Not all medical certificates are automatically considered as sick leave; they have to undergo verification and approval of the heads of department. There was no provision to take into account medical reports produced by the plaintiff. Further, the deductions had taken into account all the medical certificates produced and verified by the head of department under reg 17 of the General Orders Chapter C 1974. There was no basis to substantiate the plaintiff's claim that her medical certificates had not been taken into account (see para 41).

(4) The plaintiff failed to produce the necessary medical certificates for the period during which she was absent from work. She did not get the approval of the headmaster for her absence. The fact that there were medical reports does not automatically validate sick leave due to her absence. The medical reports are not medical certificates; as such the medical reports do not support her claim that the salary deductions were wrongly made (see para 43).

(5) The English language allowance was discontinued because the plaintiff had failed to report for work and another teacher had taken over that role. Since she had been relieved from teaching English, no incentive payment was given to her. Further, it was the prerogative of the defendants under art 132 to decide whether the plaintiff is required to continue teaching English (see para 45).

[Bahasa Malaysia summary

Plaintif, seorang guru pentadbir kanan di Sekolah Kebangsaan Taman Skudai Baru 2 ('SKTSB2'), ditukarkan ke Sekolah Kebangsaan Taman Tampoi Utama ('SKTTU') berkuat kuasa dari 1 Jun 2008. Dia menghujah bahawa perintah pertukaran tersebut adalah mala fide. Pertukaran tersebut dibuat kerana aduan yang diterima oleh defendan mengenai plaintif berkaitan dengan kerjanya sebagai guru di SKTSB2. Plaintif tidak menerima apa-apa aduan tersebut dan tidak diberikan peluang untuk menjelaskan dan mencabar aduan-aduan tersebut. Sebaliknya, dia ditukarkan keluar daripada SKTSB2 tanpa apa-apa siasatan yang sewajarnya dilakukan berkaitan dengan aduan-aduan tersebut. Selanjutnya, guaman sivil plaintif terhadap seorang ahli PIBG di SKTSB2 telah merisaukan pegawai-pegawai defendan yang bertindak menghukum plaintif bagi kebiadabannya dengan menukarkan kerjanya ke SKTTU. Selain

daripada itu, pemotongan gajinya dan *set off* terhadap gajinya tidak dilakukan menurut aturan. Gajinya dipotong oleh defendan-defendan dari 2004–2011 tanpa apa-apa alasan yang sewajarnya dan dia tidak diberikan apa-apa notis sebelum pemotongan dibuat. Dia tidak dibenarkan mengajar matapelajaran Bahasa Inggeris bermula dari Januari 2011 walaupun dia telah mengajar matapelajaran tersebut semenjak 1989 sehingga Jun 2008; dan dia tidak dibayar elaun khas bagi mengajar matapelajaran Bahasa Inggeris dari Mac 2011. Dia mengalami tekanan seawal bulan Ogos 2008 dan berterusan menerima bantuan perubatan selepas perintah pertukaran dikeluarkan. Maka, plaintif memohon terhadap defendan-defendan satu deklarasi bahawa pertukaran daripada SKTSB2 ke SKTTU adalah salah aturan dan dalam kemungkiran keadilan semulajadi. Plaintif juga menuntut, antara lain, ganti rugi bagi kehilangan gaji yang dipotong oleh defendan, kehilangan elaun sebagai guru matapelajaran Bahasa Inggeris dan ganti rugi bagi gangguan mental dan tekanan jiwa. Isu utama kes ini adalah seperti berikut: (a) sama ada perintah pertukaran adalah tidak teratur kerana dibuat secara mala fide. Jika jawapannya adalah mengiakan, sama ada gangguan mental dan tekanan jiwa adalah disebabkan oleh perintah pertukaran tersebut; (b) sama ada pemotongan gaji dan *set off* adalah wajar dan teratur; dan (c) sama ada plaintif berhak menerima elaun sebagai guru matapelajaran Bahasa Inggeris.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Walau apa pun, tidak ada keterangan untuk menjustifikasi penemuan mala fide atau ketiadaan kepercayaan pada pihak defendan dalam memberikan perintah pertukaran. Perasaan sangsi semata-mata pada pihak plaintif bahawa terdapat niat jahat tidak mencukupi. Walaupun tanggapan plaintif bahawa hukuman melalui pertukaran tersebut adalah benar, tiada peruntukan dalam Perlembagaan Persekutuan yang memberikan hak kepada plaintif untuk merujuk ketidakpuasan hatinya ke mahkamah undang-undang kecuali hukuman tersebut adalah pemecatan atau penurunan pangkat; yang bukan kes di sini. Pertukaran plaintif adalah hak prerogatif kerajaan dan bukan prosiding tatatertib yang tertakluk kepada perkara 135(2) Perlembagaan Persekutuan. Di atas fakta kes, tidak ada pertuduhan yang dikenakan terhadap plaintif sebelum perintah pertukaran; dengan itu, tidak ada keperluan peluang untuk didengar dalam menjawab pertuduhan tersebut (lihat perenggan 37).

(2) Pemotongan gaji dan *set off* dibuat berikutan peraturan 14A Perintah Am Bab C 1974. Peraturan 14A memperuntukkan gaji dipotong di mana pekerja kerajaan tidak hadir tanpa kebenaran. Jelas, peruntukan ini memberikan kuasa kepada pengetua sebagai ketua jabatan dengan kuasa untuk memotong gaji pekerja bagi tempoh ketidakhadiran dari kerja tanpa alasan yang baik. Tidak ada keperluan bagi notis diberikan sebagai prasyarat bagi pelaksanaan kuasa ini (lihat perenggan 40).

(3) Hujahan plaintif bahawa dia tidak hadir kerja kerana keadaan kesihatannya dan bahawa dia mempunyai laporan perubatan untuk menyokong tuntutannya adalah salah tanggap. Bukan semua sijil perubatan secara automatik dianggap sebagai cuti sakit; ia perlu disahkan dan diluluskan oleh ketua jabatan. Tidak ada peruntukan untuk mengambil kira laporan perubatan yang dikemukakan oleh plaintif. Selanjutnya, pemotongan tersebut telah mengambil kira kesemua sijil sakit yang dikemukakan dan disahkan oleh ketua jabatan di bawah peraturan 17 Perintah Am Bab C 1974. Tidak ada alasan untuk menyokong tuntutan plaintif bahawa sijil sakit tidak diambil kira (lihat perenggan 41).

(4) Plaintif gagal mengemukakan sijil perubatan yang perlu bagi tempoh semasa dia tidak hadir kerja. Dia tidak mendapatkan kelulusan pengetua bagi ketidakhadirannya. Fakta bahawa terdapat laporan perubatan tidak secara automatik mengesahkan cuti sakit disebabkan oleh ketidakhadirannya. Laporan perubatan bukan sijil perubatan; oleh itu laporan perubatan tersebut tidak menyokong tuntutannya bahawa pemotongan gajinya adalah dibuat secara salah (lihat perenggan 43).

(5) Elaun Bahasa Inggeris diberhentikan kerana plaintif gagal melaporkan diri untuk kerja dan seorang lagi guru telah mengambil alih peranan tersebut. Oleh sebab dia telah dilepaskan daripada mengajar Bahasa Inggeris, tidak ada bayaran insentif yang diberikan kepadanya. Selanjutnya, adalah prerogatif defendan di bawah perkara 132 sama ada plaintif akan diperlukan untuk mengajar Bahasa Inggeris (lihat perenggan 45).]

Notes

For a case on transfer, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2682.

For cases on declaration, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 944–948.

For cases on renumeration, see 8(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1248–1258.

For cases on right to be heard, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1014–1015.

For cases on standard of proof, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 734–735.

Cases referred to

Abrath v North Eastern Railway Co (1883) 11 QBD 440, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (distd)

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169; [1962] 1 LNS 14, PC (distd)
Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors [2007] 2 MLJ 761; [2006] 8 CLJ 114, HC (refd)
Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia [1969] 2 MLJ 129, FC (refd)
Ladang Tak Tai Sdn Bhd v Suppiah a/l Andy Thavar & Ors [1999] 5 MLJ 257, HC (refd)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (distd)
Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh [1992] 1 MLJ 147; [1992] 1 CLJ (Rep) 212, SC (refd)
Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68, FC (refd)
Rosneli bte Kundor v Kelantan State Economic Development Corporation [1997] MLJU 178; [1997] 3 CLJ Supp 470, HC (refd)
Selvaduray v Chinniah [1939] MLJ 253, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), 102
Federal Constitution arts 132, 135(2)
General Orders Chapter C 1974 regs 14A, 14A(c), 15, 17
Government Proceedings Act 1956 ss 5, 6
Public Officer (Conduct and Decipline) (Chapter D) General Orders 1980

T Rajasekaran (T Raja & Co) for the plaintiff.
Lee Chee Thim (Senior Federal Counsel, State Legal Advisor Office) for the defendants.

Vernon Ong J:

[1] The plaintiff, a teacher was transferred to another school in 2008. She contends that the transfer order was used as a means of punishing her instead of providing her an opportunity to challenge the complaints made against her.

BRIEF ACCOUNT OF THE FACTS

[2] The plaintiff was the senior administrative teacher (*guru penolong kanan*) teaching at Sekolah Kebangsaan Taman Skudai Baru 2, Johor Bahru ('SKTSB2').

[3] On 30 May 2008, the defendants issued a transfer order transferring the

plaintiff to Sekolah Kebangsaan Taman Tampoi Utama, Johor Bahru ('SKTTU') with effect from 1 June 2008. The plaintiff received the transfer order on 10 June 2008. The plaintiff reported for duty at SKTTU on 25 July 2008.

[4] On 5 December 2011, the plaintiff received a show cause letter from the Education Service Commission. She was asked to reply to the show cause letter on two charges — (a) for failing to return 'Notebook Fasa 5' and (b) for being absent without leave or without obtaining permission for 241 days. On 2 February 2012, the Education Service Commission issued a letter dismissing the plaintiff with effect 27 January 2012.

THE PLAINTIFF'S CASE

[5] Firstly, the transfer order was mala fide. The transfer came about because of some complaints the defendants received against the plaintiff in regards to her work as a teacher in SKTSB2. The plaintiff did not receive any such complaints and was not given the opportunity to explain and challenge the complaints. Instead, she was transferred out from SKTSB2 with any proper investigation being conducted on the complaints. Further, the plaintiff's civil suit against a particular PIBG member in SKTSB2 had perturbed the defendants' officers who sought to punish the plaintiff for her insolence by transferring her to SKTTU.

[6] Secondly, her salary deduction and set off against her salary was not done accordance with the rules. The salary was deducted by the defendants in 2004–2011 without any proper reasons and that she was not given any notice before the deductions were made. She was not allowed to teach the English subject starting from January 2011 although she had been teaching the subject since 1989 until June 2008; and she was not paid the special allowance for teaching the English subject from March 2011.

[7] She suffered nervous breakdown as early as August 2008 and continued to receive medical help to recover herself after the transfer order was issued.

[8] The plaintiff's claim is for the following:

(a) a declaration that the transfer from SKTSB2 to SKTTU is irregular;

(b) a declaration that the plaintiff was not given the right to be heard before the transfer therefore breaching the rules of natural justice;

(c) damages for loss of salary that was deducted by the defendants;

(d) damages for loss of salary retained by the defendants;

(e) damages for loss of allowance as an English subject teacher;

(f) general damages; and

(g) damages for medical costs; exemplary damages; damages for mental distress and nervous shock.

THE DEFENDANT'S CASE

[9] The defendants' defence is mounted on the following planks.

(a) the transfer order is a matter of the defendants' prerogative. It is based on public interest and not a punishment or motivated by mala fide;

(b) the salary deductions were not without basis and were properly made; and

(c) the plaintiff's claim is unsustainable as the plaintiff has failed to name any of the headmasters who have deducted her salary (ss 5–6 of the Government Proceedings Act 1956).

ISSUES FOR DETERMINATION

[10] On the facts as pleaded in the statement of claim and on the evidence adduced by the parties at the trial, the court finds that the principal issues to be determined relates to the following:

(a) whether the transfer order is irregular for being made mala fide? If the answer to this question is in favour of the plaintiff, whether the plaintiff's mental distress and nervous shock was due to the transfer order?

(b) whether the salary deductions and set off were proper and regular?; and

(c) whether the plaintiff is entitled to the allowance as an English subject teacher?

SUMMARY OF THE EVIDENCE

[11] Apart from giving testimony on her own behalf, the plaintiff also called three other witnesses. They include (a) her husband En Zulkifli bin Musa ('PW2'); (b) Dr Sivakumar Thuraisingan ('PW4') a psychiatrist; and (c) Dr Abdul Kadir Abu Bakar ('PW3') a senior consultant psychiatrist both working at Jabatan Psikiatri dan Kesihatan Mental, Hospital Sultanah Aminah, Johor Bahru. Five individuals testified for the defendants — (a) Mr Tay Tong Aik

('PW1') the Headmaster of SKTSB2; (b) En Mohd Shah bin Abu Bakar ('DW2') *Penyelia Kanan* Pejabat Pelajaran Daerah Johor Bahru; (c) Hj Aminuddin bin Adam ('DW3') *Timbalan Pengarah Hal Ehwal Murid*; (d) Puan Zainab bt Abu Bakar ('DW4') Headmistress of SKTTU; and (e) En Jamaluddin bin A Rahman ('DW5') *Penolong Pegawai Pelajaran (Rendah)*, Pejabat Pelajaran Daerah Johor Bahru.

The plaintiff's evidence-in-chief

[12] The plaintiff was a teacher from 1989 to March 2012. She taught at SKTSB2 from January 2004 until June 2008; she was then the first senior assistant teacher DG41. She had an excellent performance record as a teacher. She received the transfer order on 10 June 2008. She was not given the right to get a proper explanation from the defendants and appeal against the transfer.

[13] She said that the actual reason for her transfer was because of an unsigned petition purportedly written by several teachers from SKTSB2 asking for her transfer. She only got to know about the petition through her aunt and her brother in law who went to meet En Jamaluddin on 18 July 2008. The President of the PIBG of SKTSB2 had submitted a petition to the defendant to stop her transfer from SKTSB2 to SKTTU.

[14] Around the end of July 2008, the plaintiff met En Jamaluddin to discuss about the petition. She said that En Jamaluddin threatened her and asked her to leave SKTSB2. She did not report for duty at SKTTU and remained at SKTSB2. She also objected to the transfer as the distance from her house to SKTTU was approximately 10km and she would inevitably be caught in traffic jam on a daily routine.

[15] She also said that in 2006 she filed a suit against a guardian of a student. She was told by an officer of the first defendant complaint's department one Hj Bakri to withdraw the suit. The guardian then complained against her to the first and second defendants. She was not given an opportunity to be heard and challenge the complaint.

[16] She joined SKTTU on 25 July 2008. She did not get her allowance after she joined SKTTU. She submitted an appeal against the transfer to the third and fourth defendants but she did not get any reply from them.

[17] On 23 June 2009, she attended a meeting with the defendants where she was told that they would only take action on her appeal if she withdrew her suit. On 14 August 2009, she attended another meeting where the defendants told her that they promised to find a quick solution to her problem. On 24 August 2009, she meet one En Hanafi, Hj Kamaruddin and En Abdullah after

filing a suit to claim her salary deduction in 2009. Nothing came out of that meeting. In August 2009, she met with Hj Mustafa a representative of the third defendant; she was asked to withdraw her suit before they will consider her appeal. She also attended another meeting in August 2009 with En Aminuddin; where he agreed to transfer and asked her to withdraw her suit.

[18] The plaintiff testified that her salary was deducted from 2004–2011 without a proper explanation. She was stopped from teaching English language from January 2011 and her allowance was stopped from March 2011.

[19] After she received the transfer order she fell into depression, always felt sad, forgetful, unable to concentrate, could not sleep well, nervous, anxious and unable to carry out her role as a teacher. She consulted Dr Abdul Kadir and Dr Sivakumar. She was diagnosed with 'major depressive episode' in 2008 by Dr Abdul Kadir and 'Bipolar (II) Mood Disorder' by Dr Sivakumar. She was unable to work whilst under severe medication.

[20] In December 2011 she received the show cause letter. In March 2012, she came to know that she had been dismissed; she did not receive any formal letter.

[21] En Zulkifli and the plaintiff have been married for 24 years. He said that the plaintiff used to be a cheerful person, dedicated to her work, responsible committed and performed her work well. All that change for the worse after she received the transfer order. She came under a lot of pressure, suffered emotional distress, frequently fell ill and had high blood pressure. As a result, she could not carry out her work well. She always kept to herself.

[22] Dr Abdul Kadir testified that the plaintiff has been his patient since 5 August 2008. The plaintiff was suffering from major depressive episode since June 2008. This condition is an episode of depression triggered by the surrounding problems that occurs in working environment. Dr Abdul Kadir prescribed heavy medications, counselling for the plaintiff.

[23] Dr Sivakumar also treated the plaintiff for depression since 7 August 2010. He diagnosed the plaintiff with Bipolar (II) Mood Disorder. This condition is characterised by uncontrolled emotion and depression triggered by problems experienced or surrounding problems in working environment. He also prescribed heavy medication to the plaintiff.

[24] Mr Tay said that the plaintiff taught at SKTSB2 from 1 February 2003 to 31 May 2008. He said that the plaintiff was frequently absent from school without notice or late in submitting the medical certificates to the school. He deducted RM2,569.12 from the plaintiff's salary and allowance for the period

between 2004–2007 because the plaintiff was absent without notice (see 20–27C1). He also deducted RM5,122.65 for the period from 11 April 2008 to 31 August 2008 for the same reason (31–35C1). He was aware that the plaintiff was having emotional problems and receiving psychiatric care. On 1 June 2008, the plaintiff was transferred to SKTTU; other teachers were also involved in the transfer order. The plaintiff did not report to SKTTU as instructed. On 13 June 2008, En Jamaluddin asked him to instruct the plaintiff to report for duty at SKTTU. On 26 June 2008, two school supervisors (En Husin Kadir and En Mohd Amir Yunus) went to see the plaintiff to advise her to do the needful. She only reported to SKTTU on 25 July 2008.

[25] En Mohd Shah said he was the headmaster of SKTTU from 16 November 2008 to 16 July 2011. Between 31 December 2009 to 24 March 2011 he had written several letters to the plaintiff and issued other documents on various matters; including salary deductions for 2009–2011, on 'Penyemakan dan Penandaan Kertas UPSR', on the 2008 performance assessment form and numerous reminders for the return of the form, absence without leave or permission (36–61C1). He said that even though the plaintiff had been given prior notice of her salary deductions and time to dispute the deductions, the plaintiff did not come forward to do so. He issued the letters because the plaintiff was indebted for over payment of salary and did not make any payments even after the letters were issued to her. All the claims for payment back of salary was due to the plaintiff being absent without medical certificate or leave. He added that the English language allowance was discontinued because the plaintiff failed to report for work and another teacher had taken over that role.

[26] According to Hj Aminuddin the Johor Education Department Panel made the decision for the transfer order. The Johor Education Department did not receive any appeal against the transfer order. The plaintiff failed to comply with the transfer order which required her to report for duty at SKTTU on 1 June 2008. As she only reported for duty on 25 July 2008, he issued a show cause letter to the plaintiff on 7 August 2008 and a reminder on 13 August 2008. In the meantime, he received a letter dated 8 July 2008 from the office of the Education Minister supporting the application to cancel the transfer order. On 13 August 2008, he replied to that letter stating, inter alia, that the Johor Education Department had decided to maintain the transfer order. He also said that the salary deductions were properly made by the headmasters of SKTSB2 and SKTTU in their respective capacities as department heads. A suit filed by the plaintiff (OS No 24–3540 of 2008) over the salary deductions for July–August 2008 was dismissed with costs.

[27] Puan Zainab has been the headmistress of SKTTU from 16 July 2011.

On 5 December 2011, the Education Service Commission issued a show cause notice to the plaintiff giving her 21 days to make representations. As the plaintiff failed to make any representations, the plaintiff was dismissed with effect from 27 January 2012. Consequent thereon, she issued a letter to the plaintiff on 28 May 2012 claiming for RM6,713.79 being over payment of salary and allowance for 2010–2011.

[28] En Jamaluddin testified that the plaintiff was transferred to SKTTU to safeguard the harmony and working environment in SKTSB2 and the fact that the plaintiff had already served for 4 1/2 years at SKTSB2. 16 other teachers were also involved in the transfer exercise. On 14 April 2008 the plaintiff had contacted him because of a misunderstanding between her and a male teacher one En Kamarulzaman who threatened to punch her. He said that when the plaintiff failed to report for duty at SKTTU, his department sent two officers to see her to advise her to do so; he denied that the officers had threatened the plaintiff. He also met with the plaintiff's auntie and brother-in-law to try to resolve the matter. The plaintiff also saw him on 21 July 2008 and he advised her to report for duty at SKTTU. He said that he did not have the power to transfer the plaintiff; and that the power vested in the panel of the Johor Education Department.

FINDINGS OF THE COURT

Whether the transfer order is irregular for being made mala fide? If the answer to this question is in favour of the plaintiff, whether the plaintiff's mental distress and nervous shock was due to the transfer order?

[29] Two incidents appear to be the underlying currents preceding the transfer order. The first relates to the petition by a group of teachers from SKTSB2 in September 2007. The second relates to a quarrel between the plaintiff and a guardian cum PIBG member which led to the plaintiff filing a civil suit against the guardian in 2006.

[30] En Jamaluddin said under cross-examination that notwithstanding the petition he did not transfer the plaintiff out in 2007 because the plaintiff was due for a promotion in January 2008. He explained that the transfer was carried out based on a number of factors such as the duration a teacher has been teaching at the same school, promotion purposes, harmony in working environment, on teacher's own application for transfer, problems at workplace, etc. The plaintiff had already been teaching at SKTSB2 for 4 1/2 years when the transfer order was issued. Further, 16 other teachers including the plaintiff were also involved in the transfer.

[31] At this point, it is necessary to consider the defendants' reply. Firstly, it

was submitted that the plaintiff's challenge is academic as there is no living issue here — the fact that she had already accepted the transfer and reported for duty at SKTTU on 25 July 2008; and the fact that the plaintiff had been dismissed since February 2012. It would be an exercise in futility to declare her position now as it will not put her back to her old position. Granting the declarations would tantamount to the court acting in vain as the door had been closed shut by her dismissal and there is no way for her to be reinstated save for a challenge on the dismissal itself (*Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; [1992] 1 CLJ (Rep) 212; *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977; *Ladang Tak Tai Sdn Bhd v Suppiah a/l Andy Thavar & Ors* [1999] 5 MLJ 257).

[32] Secondly, it was submitted that the plaintiff had failed to prove mala fide or the lack of bona fide on the part of the defendants (*Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1969] 2 MLJ 129). The intense rivalry between the plaintiff and a handful of teachers, a guardian and fellow teacher En Kamarulzaman had made the plaintiff look at every turn of events including the transfer as a win/lose situation and zero sum game. En Jamaluddin did not share this perception with the plaintiff; he was looking at the situation from an overview and had acted to maintain the harmony and functionality of the school. En Jamaluddin had acted objectively without mala fide and had actually disregarded the petition to allow the plaintiff to be promoted. Further, no useful purpose could be served by hearing the plaintiff's allegations of mala fide in the light of the government's prerogative to transfer its servants. The transfer is not justiciable (*Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 (FC)). Therefore, even if the transfer was prompted by improper motive or bad faith, the plaintiff had no cause of action. This action was based on a misconception of law.

Burden of proof in civil proceedings

[33] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish her case that the transfer order was mala fide. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendants have not established their defence

(*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a prima facie case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiff had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon her, and the plaintiff must necessarily fail (*Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at p 452 (CA)).

[34] Mala fide is the opposite of bona fide. Bona fide is defined to mean 'in good faith, honestly, without fraud, collusion or participation in wrongdoing' (*Osborn's Concise Law Dictionary* (8th Ed), Sweet and Maxwell). It follows that mala fide means conduct which is not in good faith, conduct which is tainted with fraud, collusion or participation in wrongdoing. A decision may be said to be mala fide if there was an ulterior motive behind the making of the decision or if the decision was made for an improper, illegal or immoral purpose.

[35] In this regard, learned counsel for the plaintiff argued that the transfer order was mala fide for a number of reasons. Firstly, there were allegations of misconduct against the plaintiff which she was never given the opportunity to reply or to defend to the allegations. Instead of holding an enquiry, the defendants merely transferred her to SKTTU. Secondly, the plaintiff was transferred despite the fact that she was teaching English to a group of UPSR students in SKTSB2 and the examinations were only in a few months time before the transfer. Thirdly, the transfer order was issued even though the defendants had received a letter from the PIBG chairman urging that the plaintiff should not be transferred (56–57B3). Fourthly, Hj Aminuddin said that an enquiry was carried out on the petition but the plaintiff was never called to give evidence or defend herself against the allegation. En Jamaluddin had closed the case without conducting any proper investigation. Even though the transfer is an issue that is within the purviews of the government to decide, the process relating to the transfer can still be questioned by the court (*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169; [1962] 1 LNS; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525). Further, an application to challenge a decision of a public authority can be made by a declaratory relief and the plaintiff has the right of being given a fair and just hearing and an opportunity to defend her case (*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145).

[36] The reasons put forth by the plaintiff above underlies her perception that the defendants used the transfer order to punish her. On the facts as

A disclosed in the evidence, there is nothing to support the plaintiff's claim that the transfer order was mala fide. This is no evidence to show that the defendants had acted with any improper or illegal motive; they were acting well within their powers. There is no evidence that the defendants were acting in concert against the plaintiff. The defendants did not conduct a formal hearing or
B inquiry into the petition against the plaintiff. There was nothing for the plaintiff to defend or reply to. En Jamaluddin monitored the situation on the ground. He felt that if the plaintiff continued teaching at SKTSB2, the situation at SKTSB2 would get out of hand and the relationship between the plaintiff and the other teachers would deteriorate. Hj Aminuddin explained in
C re-examination that there is no requirement for a hearing before a panel prior to the transfer.

[37] Even if the plaintiff's perception of punishment via transfer is true,
D there is nothing in the Federal Constitution that entitles the plaintiff to bring her grievances before a court of law unless the punishment amounts to a dismissal or reduction in rank; which is not the case here (*Rosneli bte Kundor*). In respect of government servants, the right to be heard is limited. Under art 135(2) of the Federal Constitution it relates to dismissal or reduction in rank
E without being given a reasonable opportunity of being heard. Accordingly, the plaintiff's contention that she was not given the right to be heard is misconceived; her transfer being a prerogative act and not a disciplinary proceeding subject to art 135(2) aforesaid. On the facts of this case, there were no charges preferred against the plaintiff prior to the transfer order; therefore,
F there was no requirement of an opportunity to be heard in answer to the charges (*Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298). The cases (*Surinder Singh Kanda* [1962] MLJ 169; [1962] 1 LNS 14; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525; *Ahmad Jefri bin*
G *Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145) cited by learned counsel for the plaintiff are distinguishable as the parties were accorded the constitutional right to be heard under art 135(2).

H **[38]** The court agrees with the submission of learned senior federal counsel. There is no living issue for the court to adjudicate upon. Further, so long as the plaintiff was in the civil service she was subject to be transferred to any post at the absolute discretion of the government. The power to transfer is a prerogative right of the government. As such there is no right to be heard (*Loot*
I *Ting Yee*). The plaintiff's argument that the issue is whether the court has the power to look into the manner in which the transfer order is made is but another way of challenging the transfer order. At any rate, there is no evidence to justify a finding of mala fide or lack of good faith on the part of the defendants in making the transfer order. Mere suspicion on the part of the

plaintiff that there is mala fide is not enough (*Rosneli bte Kundor v Kelantan State Economic Development Corporation* [1997] MLJU 178; [1997] 3 CLJ Supp 470).

[39] For the foregoing reasons, it is clear that it is not for the court to pronounce upon the legality or to look into the manner in which the transfer order was made. Accordingly, the question posed by the plaintiff is a non-issue. The plaintiff is not entitled to the declarations sought in prayers (a)–(b).

Whether the salary deductions and set off were proper and regular?

[40] In this case the salary deductions and set off were made by Mr Tay and En Mohd Shah in their capacities as the headmasters of SKTSB2 and SKTTU respectively. The deductions were made pursuant to reg 14A of the General Orders Chapter C 1974. Regulation 14A provides for salary to be deducted where a government employee is absent without leave. It is provided under sub-reg (c) of reg 14A that this provision is an administrative power and not a disciplinary power; however it does not affect the disciplinary provisions under Chapter D. Clearly, this provision empowers the headmasters qua head of department with the authority to deduct wages of the employee for periods of absence from work without good reason. There is no requirement for any notice to be given as a prerequisite for the exercise of this power.

[41] The plaintiff's argument that she was absent from work due to her medical condition and that she had the medical reports to support her claim is also misconceived. Under reg 17 of the General Orders Chapter C, the head of department is empowered to approve medical leave of not more than 90 days medical or sick leave in a calendar year. Medical leave in cases of medical certificates from private clinics are limited to 15 days a year for out patients. Further reg 15(c) provides that sick leave based on medical certificates from both private and government cannot exceed 180 days. In effect, not all medical certificates are automatically considered as sick leave; they have to undergo verification and approval of the heads of department. There is no provision to take into account medical reports produced by the plaintiff.

[42] It is also evident that all the plaintiffs medical certificates had been accounted for by the defendants. For year 2009, the medical certificates (exhs P4A–4B) for the months of January, February, March and June have been accounted for as none of the date (in 6B2) show absence for those months in question. For year 2010, the dates of the medical certificates were beginning at the end of June, ie 22 June (at 60B1) till the month of November 2010 (at 67B1) and is accounted for as none of the absent dates 6B2) from January–June 2010 clashes with the dates of the medical certificates. For year 2011, the medical certificates (at 68 and 69B1) are accounted for (at 6B2). Therefore, the

deductions had taken into account all the medical certificates produced and verified by the head of department under reg 17 of the General Orders Chapter C 1974. There is no basis to substatiate the plaintiff's claim that her medical certificates have not been taken into account. Her claim for deductions of her July–August 2008 were the subject of a Suit No 24–3540 of 2008 in the Johor Bahru High Court which suit had been dismissed.

[43] In all the circumstances of this case, the court is satisfied that the plaintiff failed to produce the necessary medical certificates for the period during which she was absent from work. She did not get the approval of the headmasters for her absence. The fact that there were medical reports (exhs P6–P7) do not automatically make her absence as sick leave. The medical reports are not medical certificates; as such the medical reports do not support her claim that the salary deductions were wrongly made by Mr Tay and En Mohd Shah.

[44] For the foregoing reasons the question is answered in favour of the defendants.

Whether the plaintiff is entitled to the allowance as an English subject teacher?

[45] The plaintiff's complaint here is that she was not paid the special allowance for teaching English subject from March 2011. This issue was not taken up in the written submission of the plaintiff. Be that as it may, in 2011 the plaintiff was absent without medical certificate for 132 days. Her absence resulted in parents complaining through a petition letter (66B3). En Mohd Shah the Headmaster of SKTTU testified that the English language allowance was discontinued because the plaintiff had failed to report for work and another teacher had taken over that role. Since she had been relieved from teaching English, no incentive payment was given to her (see *Rosneli Kundor*). Further, it is the prerogative of the defendants under art 132 to decide whether to require the plaintiff to continue to teach English (*Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors* [2007] 2 MLJ 761; [2006] 8 CLJ 114). In these circumstances, the plaintiff's contention is unsustainable.

CONCLUDING REMARKS

[46] The plaintiff's principal contention is that the defendants acted mala fide and had transferred her based on a petition by a group of teachers in September 2007. She complains that she was not given the right to be heard before the transfer order was issued. She said that the transfer order was a punishment and consequently she is seeking a declaration that the transfer is irregular and for damages. The other contention relates to the depression she suffered due to the transfer. There is also the issue of her salary deductions for

the period during which she was absent and her claim for the allowances for teaching English which she say was wrongly denied her.

[47] The plaintiff has failed to make out a prima facie case against the defendants. She did not satisfy the evidential burden of proof. In addition, unlike a decision involving a dismissal or demotion, the transfer order is not a decision that is justiciable. The salary deductions were not improper; they were founded on valid grounds and made in line with the general orders. The claim for the allowance for teaching English is also without merit as the plaintiff was no longer teaching the English subject and as such she was not entitled to receive the allowance.

[48] For the reasons adumbrated above, the plaintiff's claim against the defendants is unsustainable in law and in fact. Consequently, the plaintiff's claim is hereby dismissed with costs of RM3,000.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed